No. 3845

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES C. DAVIS, as DIRECTOR GENERAL OF RAILROADS, Operating the Chicago, Milwaukee & St. Paul Railway, and AGENT Appointed Under the Transportation Act of 1920,

Plaintiff in Error,

vs.

AMERICAN SILK SPINNING COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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REPLY BRIEF TO THE BRIEF FILED IN BEHALF OF THE DEFENDANT IN ERROR.

A considerable part of the argument contained in the brief on behalf of the defendant in error is devoted to an effort to restrict the review of this case by this Court on technical grounds. The real contention of the defendant in error being that this Court is concluded by the findings of fact made by the Trial Court. All of the brief, extending from page 6 to page 16 thereof, amounts to a mere discussion of what may be reviewed by this Court. To all this it is a sufficient reply to say that, by its decision rendered in the case of Societe Nouvelle D'Armement vs. Barnaby, 246 Fed. 68, this Court has saved the right to review judgments based on special findings that are not supported by competent evidence. That decision of this Court being a sufficient and complete answer to all that is contained in that portion of the brief referred to.

In a further attempt to confine the review of this case within narrow limits, it is claimed that the assignments of error not specifically referred to in the argument on our side may be excluded from consideration as having been abandoned. In reply we merely assert that our effort to make a comprehensive argument of all material questions in the case without being tedious cannot be fairly construed as an abandonment of any question that is material. The assignments of error are specific and touch all the details of the case, and are sufficient to preclude any snap judgment being taken against us on the pretense that a particular point has not been saved by being assigned as error.

That our position may be clear, a short answer to our adversaries' contentions respecting each of the Court's findings to which exception has been taken will now be given:

Exception No. XVII, referring to the Court's finding No. III, our exception being to the finding of the Court that 500 bales of damaged silk waste were of the quality known as No. 1 Canton Steam Silk Waste. To meet this exception the brief quotes testimony, and all of the testimony to be found in the record relating to the numbers respectively of Number 1 and Number 2 qualities of silk waste. This is found in the deposition of Edward W. Lownes, who, by his own testimony and other testimony, is shown affirmatively to have been incompetent to give the testimony quoted because he did not have knowledge on the subject. In answer to a question whether he had opened any bales to test them Mr. Lownes gave the following answer:

> "It didn't come in bales. Came in a large matted mass like manure, smelled very strong and I didn't want to handle it very much myself." (Rec., p. 134.)

Charles E. Burling, a witness for the defendant in error, testified that he was the auctioneer who sold the damaged goods at auction, and his testimony is as follows:

> "Q. What was the physical condition of the silk? A. In very bad shape, wet, tangled—it was assumed that there are 867 bales, but no

> mortal man could tell whether there were 8,000 or 800—I will modify that; no mortal man could possibly testify how many there were. Q. The bales were broken? A. All broken the worst, almost, I ever saw, and we had to get some outside help, our men would not handle it, absolutely refused because of the odor and the difficulty. The condition was so bad that it would take 2, 3 or 4 men 15 minutes to half an hour to unwind a long skein, pull it out, otherwise you would have to cut it; it was so badly tangled that I had great difficulty in handling it and then the odor drove away most of the buyers as well as the laborers."

Finding No. VIII: The exception taken is on grounds similar to the preceding, our contention being that there was no competent evidence by a witness who knew the facts to prove the number of bales of each of the 2 grades.

To meet our exception to finding numbered IX, the testimony of witnesses Taylor and Alleman are quoted, and in the brief it is said:

> "The Trial Court having carefully examined the evidence, prepared this finding and expressed it in its own language. A careful comparison of the words of the finding with the testimony of several witnesses in support of it will show that the finding is practically a reiteration of the exact words of the witnesses whose evidence supports it."

It is true that this finding is more in the nature of a recital of some testimony than a declaration of a fact, but instead of being an exact recitation it varies, words are interpolated by the Court which are not in the testimony and statements contained in the testimony are not in the Court's recital, and

in those discrepancies are to be found error prejudicial to the plaintiff in error of sufficient gravity to require a reversal of the judgment. Displaying those errors we place finding No. IX in a parallel column with the testimony of Mr. Taylor.

IX.

That the 133 bales of waste silk which had not been wet with salt water were in due course transported by defendant to destination.

That the remaining 867 bales which had been wet with salt water were discharged on the dock which dock belonged to the Chicago, Milwaukee & St. Paul Railway Company, and was then being maintained and operated by defendant as a part of said railway system.

That after the vessel had commenced discharging the wet silk, Mr. Taylor, the representative of the underwriters and owners thereof, called on Mr. Cheeney, the chief clerk of the freight agent at Tacoma, and who was in charge of the dock and the movement of freight therefrom, and told Mr. Cheeney that he was very anxious to have quick dispatch of the wet silk, and that it was important that it should go forward in its wet condition. Cheeney and Taylor looked at the silk as it was being discharged from the vessel and placed on the dock, and Taylor requested that it be forwarded by silk train service in refrigerator-cars, *and Cheeney agreed to so forward it,* stating that the cost of such service would be $7.50 per hundred pounds as against the bill of lading freight of $1.75 per hundred, and that there would be an additional charge for refrigeration of approximately $21.00 per car to pay, *all of which Taylor agreed to.* On August 14th, Taylor again called on Cheeney to see how the matter was progressing, and he and Cheeney again examined the silk, and Taylor was told by Cheeney that the cars had been ordered and would be brought in shortly, and thereafter the cars were brought in, and approximately one-half of the wet silk bales were loaded on two or more refrigerator-cars for shipment.

TESTIMONY OF FRANK G. TAYLOR.

"A. I asked Mr. Cheney if it would be possible to forward the silk by silk train service, and he said that it would. I asked him if it could go in refrigerator-cars and he said that it could. After that we talked generally, possibly, for a few minutes and then Mr. Cheney and I walked down to the end of the wharf. The silk was coming out of the ship at that time and was piled between the two warehouses, between No. 1 and No. 2. By piling, I do not mean to say that one bale was on the top of the other. It was standing on end. We looked over the silk and looked over some of the other cargo that was coming out, and then walked back to the office—to his office. When we got back to his office I asked Mr. Cheney what it would cost to send that by silk train service, and he told me that it would be $7.50 per hundred, as against $1.75 for the bill of lading rate.

"Q. $1.75 had been prepaid? A. $1.75, as I understand it, had been prepaid; and I inquired regarding the cost of refrigeration, and he told me that it would (73) cost, approximately, $21.00 a car—the icing. I discussed with Mr. Cheney the importance of keeping the cargo wet while it was on the wharf and en route, and it was arranged to have a man go there and hose it down, and that was done, and I left Mr. Cheney then and I went back to Seattle. * * * A. I went over to Tacoma on the 14th. I went over there that day to see just how things were getting along, and everything was all right; progressing. Mr. Cheney told me that the cars had been ordered to be brought in shortly. I went down and looked at the silk with Mr. Cheney, and some of the bales, the heat had gone out of the bales entirely; others were still warm; and I went back to Seattle again. * * * A. I went over on the 16th, figuring that I would find the cars loaded and ready to go out. I went and called on Mr. Cheney and was told that Mr. Wilkinson, whom I understood to be the assistant freight agent of the Milwaukee road in Chicago, had been there on the previous day and I don't know whether he stopped the loading of the cars, *but he said that they could* (74) *not go forward.* * * * A. The assistant claim agent, yes. I was very much surprised and expressed myself to Mr. Cheney that way, *who told me that he could do nothing, and suggested that I see Mr. Alleman.* * * * A. Yes; I went to see Mr. Alleman *and Mr. Alleman told me that the only one that could overrule Mr. Wilkinson was Mr. H. B. Earling, the vice-president of the road in Seattle.* * * * A. I went in to see Mr. Barkley and went over the whole situation with him; telling him how I had gone over to Tacoma—that I was one of the first ones to get there and we had been promised prompt dispatch, and the importance of getting this silk east as promptly as it possibly could get there, *and told Mr. Barkley that we would be willing to pay the expenses of one man, or two men, to accompany that shipment east for the purpose of keeping it wetted down, and inspecting it at the stations, if necessary, and for icing, to see that it was properly iced.* I told him that we would also be willing to give the railroad company an undertaking to hold it harmless for any further damage that might occur to the silk waste by reason of its having been forwarded in its present condition. Mr. Barkley told me that he would communicate with Mr. Earling. I told him also that if he would telephone over to Tacoma I was very sure that Tacoma would confirm what I said as to the heat diminishing in the bales.

"In a few minutes Mr. Barkley left me, excused himself and went out of the office, and I was there at that time, possibly fifteen minutes, when he came back and I asked him if he had telephoned over to Tacoma, and he said that he had and that they confirmed what I said regarding the diminishing of the heat in the bales; and I left Mr. Barkley then, waiting for him to report to me after he had heard from Mr. Earling.

"That was on the 17th. On the 19th I called on Mr. Barkley again. He had heard nothing from Mr. Earling. On the 20th I called on Mr. Barkley—he had heard nothing then.

"On the 21st I called on Mr. Barkley, and he told me that (76) the road had decided to forward this freight—to forward the waste; and on the 22d—

"Q. (Interposing.) This was the day following?

"A. The day following, I went over to Tacoma again and saw Mr. Cheney and arranged for the forwarding of the silk in the manner that we had previously arranged."

To sustain the findings in paragraphs X and XI, evidence is cited that falls far short of proof of what those paragraphs are intended to affirm. The vitals of the case are contained in those paragraphs and unless they are entirely true the judgment must be reversed and the case dismissed.

Error mingled with truth in a single proposition or statement of fact taints it so that the whole must be regarded as being entirely false. The evidence cited to sustain those two paragraphs is limited to proof of the fact that bales of the wet silk were loaded on cars and unloaded again. But instead of these simple facts the findings are compound statements of matter affecting the ultimate conclusion which is entirely untrue. Those two paragraphs need to be analyzed. Paragraph X begins with the statement "that *thus* contracting for and accepting all of said 867 bales of wet waste silk for transportation *as aforesaid,*" and it concludes with the words "all contrary to the terms and requirements of the *aforesaid* contract of carriage." Finding XI begins with the statement "that at the time said 867 wet bales were accepted for shipment *as aforesaid* and at all times thereafter, the same were properly packed and in condition for safe transportation by defendant from Tacoma to destination by *silk or passenger train service in refrigerator-cars,* and such transportation was not prohibited *by any regulation of the Interstate Commerce Commission.*"

Both these findings are predicated upon false premises by the apparent reference thereto of some-

thing antecedent as being a contract or agreement; they falsely assume that the conversations between the witness Taylor and Cheney constituted a consummated agreement or contract. That assumption is not warranted for the reasons hereinbefore shown; and further, because the terms and effect of the assumed agreement are undiscoverable. The finding XI says that the goods were properly packed and in safe condition for transportation: How? That is by silk *or* passenger train service. The disjunctive "or" leaves the assumed agreement indefinite and uncertain. Furthermore, the method of transportation by passenger or silk train service is a matter that is indefinite and uncertain, the finding is merely suggestive of an unwarranted assumption that the transportation business of railroads is so conducted that merchandise may be carried in carload lots by passenger trains, or that "silk train service" is a phrase which in and of itself defines a particular method of transportation. If the agreement was for transportation by a passenger train the Court must visualize the extraordinary condition of a passenger train being subjected to the burden of hauling a number of freight-cars loaded with damaged goods requiring for the preservation thereof periodical stoppages for wetting, that is, by drenching the bales, so disorganizing the passenger service that those having tickets entitling them to a continuous journey to meet their business engagements would be delayed while the necessary care was being bestowed upon the freight-cars. It must

be kept in mind that the wet silk had to be moved over connecting lines all the way from Tacoma to Providence, R. I. The testimony shows that for the necessary wetting of the damaged bales there would be twenty stoppages between Tacoma and Chicago, each stoppage involving a delay of four hours, or one hour to each car; that is, it would take one hour's time for wetting each of the four carloads, or something over three days. See testimony of Brown (Record, pp. 386, 387).

The evidence cited gives no information with regard to the requirements for silk train service. (Here a slight digression for the purpose of explanation is permissible. The transcontinental lines of railway catering to Oriental commerce render special service in the transportation of cargoes of tea and silk brought to the coast by ocean carriers. A tea train or a silk train furnished for quick transit necessarily involves a heavy expense, the amount being prohibitive except when a sufficient number of carloads can be collected to move in one train, not less than seven in number. (See testimony of Brown, Record, p. 387.) The conditions for this special service and the rates are covered by the tariffs filed as required by law with the Interstate Commerce Commission, but they do not provide for the extraordinary attention and services exacted in this case by Mr. Taylor in his conversations with Cheney and with Barkley.) This point is explained in the testimony of Brownell (Record, pp. 511 to 516). Finding XI concludes by stating

that the extraordinary services required under the fictitious agreement made with Cheney was not prohibited by any regulation of the Interstate Commerce Commission; that is a gratuitous statement for which no purpose can be discovered unless it be to befog the case. As a matter of fact, the regulations of the Interstate Commerce Commission contained in Exhibit No. 25 (Record, pp. 492, 493), do prescribe that certain commodities, including "textile wastes," must not be offered for shipment when wet. That regulation had been promulgated and was a guide and a warning to the agents of the railway. But irrespective of any regulation or lack of regulation by the Interstate Commerce Commission, higher authority, that is to say, the interstate commerce law enacted by Congress in section 6, contains the positive prohibition against all such special agreements on the part of railway carriers for extraordinary service in the transportation of merchandise so that the assumed agreement, if it had been actually consummated, and was full and explicit in all of its details, would have been unlawful and absolutely void.

Pages 34 to 46, inclusive, of our adversary's brief, is devoted to recitals and some quotations of testimony relating to the condition of the 867 bales, all of which instead of proving the same to have been in normal condition and fit for transportation, proves the contrary. By the most liberal interpretation of that testimony the Court can find only expressions of opinions with regard to the fitness of

the stuff for transportation, the effect of which is entirely nullified by the statement on page 34 of the brief, "that the bales were in condition for safe transportation from Tacoma to destination by silk or passenger train service in refrigerator-cars." The converse of that proposition is that the stuff was not in fit condition for transportation otherwise than by *special service* by a silk or passenger train in refrigerator-cars. Therefore, the 867 bales in the condition in which they were tendered for transportation were not in the good order which the bill of lading contracts specified as essential to acceptance for transportation by the railway carrier.

These two findings, X and XI, are the basis for the Court's conclusion of law in paragraph 2 thereof (Record, p. 44), which follows:

> "That the contract between Cheney and Taylor for the movement of the goods from Tacoma by silk train in refrigerator-cars was valid and binding on the defendant and no good sufficient reason is shown for defendant's refusal to comply therewith."

And that conclusion is the basis on which the judgment of the Trial Court is rested. There is no pretense in the pleadings, arguments of counsel or findings of the Court that the bill of lading contracts were not fully performed on the part of the railroad carrier. Instead of that, a special contract is set up: a contract by and between whom? Why, a contract between Cheney and Taylor, and the record is destitute of any scintilla of evidence tending to prove that either one of them had any au-

thority whatever to represent or bind either party to the record in this case. But if it were a contract to which the plaintiff in error was a party by which he had attempted to make a special agreement for extraordinary services not covered by the tariffs on file, the action would be without any legal foundation whatever, because railroad transportation service in the United States is regulated by an Act of Congress that is positive and emphatic in its provisions and required to be enforced with rigor. On that subject the pronouncements of the Supreme Court of the United States leave no ground for courts of lesser authority to adjudicate rights otherwise than in accordance with the rule of "thus saith the law."

In our opening brief some of the Supreme Court decisions are cited on page 44, and it is a significant circumstance, amounting to a confession of error, that our adversary's brief makes not the slightest reference to any of those decisions. The main purpose of the Interstate Commerce Law was to eliminate entirely from all transportation transactions the vice of rebating and discriminat*u*on by means of specific contracts. Interstate Commerce Act, section 3, provides:

> "It shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever."

And section 6 provides:

> "1. That every common carrier subject to the provisions of this act, shall file with the commission created by this act, and print and keep open to the public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * *
>
> "7. No carrier shall engage or participate in the transportation of passengers or property as defined in this act unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, *or for any service in connection therewith;* between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

Giving effect to this provision of law, the Supreme Court, in the case of Atchison etc. Railway Co. vs. Robinson, 233 U. S., pp. 173–180, after citation of preceding decisions of the Court, said:

> "We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. (Great Northern Ry. vs. O'Connor, 232 U. S. 508.)
>
> "To give to the oral agreement upon which the suit was brought, the prevailing effect al-

lowed in this case by the charge in the Trial Court, affirmed by the Supreme Court of the state, would be to allow a special contract to have binding force and effect, though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission."

Kansas City Southern Ry. Co. vs. Carl, 233 U. S. 652.

"To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

(233 U. S. 172, at page 181.)

That decision of the Court denied the right of a shipper to recover damages for breach of an oral agreement or contract on the part of the station agent for the transportation of a race-horse by failing to forward the animal by the train and within a time especially agreed upon, time being the essence of the contract and necessary to enable the animal to participate in a race scheduled for a particular time, there being no tariff provided for such special service.

The case of Southern Railway Company vs. Prescott, 240 U. S. 632, was an action brought to recover for the loss of nine boxes of shoes which were destroyed by fire while in the possession of the Southern Railway Company. The boxes had been

shipped at Petersburg, Va., by the Seaboard Air Line Railway and connections, consigned to defendant in error at Edgefield, Carolina, had arrived at Edgefield on the line of the Southern Railway Company. The plaintiff alleged three causes of action against the railway company (1) as common carrier, (2) as warehouseman, and (3) for penalty because of failure to adjust and pay the claim, after notice, as provided by law. The plaintiff recovered a judgment in the Trial Court, which the Supreme Court reversed. The loss was caused by a fire which destroyed the warehouse in which the goods were stored. There was nothing in the circumstances to indicate neglect on the part of the railway company. In reversing the judgment the Court held that the case was not covered State law but the measure of the carrier's liability under the bill of lading involved a federal question. On page 638, the Court said:

> "It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Tex. & Pac. Rwy. vs. Mugg, 202 U. S. 242; Kansas Southern Railway vs. Carl, 227 U. S. 639, 652; Boston & Maine R. R. vs. Hooker, 233 U. S. 97, 112; Louis. & Nashville R. R. vs. Maxwell, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. Chicago & Alton R. R. vs. Kirby, 225 U. S. 155, 165; Atcheson etc. Ry. vs. Robin-

> son, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities' save as these have been duly specified."

The Kirby case, 225 U. S. 155, was an action in *assumpsit* to recover damages for breach of a special contract for the shipment of a carload of high-grade horses from Springfield, Illinois, to New York City. A verdict and judgment in favor of the plaintiff for damages was affirmed by the Supreme Court of Illinois, but reversed by the Supreme Court of the United States, which held that special contract to be invalid under the Interstate Commerce Act. As stated in the opinion of the court by Mr. Justice Lurton:

The facts essential to be stated were that Kirby was engaged in developing high-grade horses and desired to send a carload to be sold at a public sale to be held in New York City. Several routes were available, and the published livestock rates for carload shipments were the same by each route. It was very desirable to send them by the route that would insure their arrival in the shortest time after delivery to the carrier. That the railroad company had established and published their joint rates and charges upon carload shipments of livestock to New York was not disputed. The rates furnished defendant in error were the regular published rates, but those rates and schedules did not provide for an

expedited service, nor for transportation by any particular train.

The opinion states:

> "The single Federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through to New York by the Horse Special, leaving Joliet on the 25th of January."

The opinion cites the provisions of the Interstate Commerce Law and then states the law applicable to the case in view of the statutory law:

> "The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time or make a particular connection, *or to carry by a particular train.* The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay, would be the answer. But the company, by entering into an agreement for expediting the shipment came under a liability different and more burdensome than would exist to a shipper who made no special contract.
>
> "For such a special service and higher responsibility, it might clearly exact a higher rate, but to do so it must make and publish a rate open to all. This was not done.
>
> "The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the Act. It is also illegal, because it is an undue advantage in that it is not one open to all others in the same situation. * * *

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all, and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed in New York N. H. & H. Railroad Company vs. Interstate Commerce Com., 200 U. S. 361, 391, and in Texas & P. Railroad Company vs. Abilene Cotton Oil Co., 204 U. S. 426, as to need no reiteration."

The entire XIII finding relates to the process of drying the wet silk waste, which was undertaken and contracted for by Mr. Taylor representing, as he says, the underwriters and owners. The bare statement of the proposition that the natural and proximate result of the drying of the bales was a weakening of the fibre and discoloration is so contrary to common sense that it might be dismissed as an absurdity. It is in fact comparable to blaming a surgical operation necessary for the cure of an ailment as the cause of the pain. The silk waste

was a commodity for use in a dry state, and the drying of it was a process which if not antecedent to shipment would have been certainly necessary before any use could be made of it. As to its having been done in a reasonable and proper manner, we refer to the testimony of H. Meyer (Record, 427, 428), by which it is shown that the process of drying was to open up the bales, a part of them at a time, and spread the material out in the open air, and it was frequently rained upon. Later, the process was conducted in a room equipped as a dry kiln.

The reasonable and most proper method of conducting the process of drying was described in the testimony of Dr. H. K. Benson (Record, pp. 505, 506), as follows:

> "Q. Now, Doctor, taking into consideration this cargo of wet silk in a saturated condition as it came out of the hold of the ship, and if you were required to recondition it, what would you want done the first thing in order to recondition it so as to ship it?
>
> "A. Well, I think there are three methods. The natural one would be to dry it, I think, in a dry kiln—kilns that are prepared; and open up the bales as much as possible and put them in and keep them apart with good circulation of air, and washing it carefully.
>
> "Q. Are there dry kilns around this territory?
>
> "A. Yes. The other method, I think, would be to freeze it absolutely solid; and the third method, I think, would be to send it in a tank immersed."

Referring to finding XIV, the difference between the finding requested by the plaintiff in error as set out in assignment of error No. X (Record, p. 602), and the Court's finding is that our request was for the Court to find according to the exact figures contained in the deposition of Mr. Lownes, which is the only testimony fixing the values. Mr. Lownes was the President of the American Silk Spinning Company, the plaintiff suing in the case, and if his own testimony is not conclusive as to the values of the silk in its undamaged condition and the amount to be subtracted for injury resulting from the marine disaster in which it was submerged in salt water, then there is absolutely no evidence fixing those values. The Court's finding is based, not on evidence, but on the argument of attorneys for the defendant in error in which they are obliged to substitute for the testimony of their own witness their own arbitrary conclusion as a basis for the statement of values which they made up and which the Court adopted. Arguing around the circle, they say, on page 58 of their brief, that their figures "are the exact figures as found by the Trial Court." On page 56 of their brief, they say: "Mr. Lownes endeavored to state in exact dollars and cents the value of the silk in question at New York, but it is very manifest that the total amounts, as given by him, *are incorrect,* and that through inadvertence, he computed the value of the bales of number one silk at eighty-seven cents per pound, which he testified was the value of the No. 2 silk, and that through

like inadvertence, he computed the value of the bales of No. 2 silk at $1.51 per pound, which was the value of the No. 1 silk. *It is rather unfortunate* that this error in computation of values was made."

That deposition was taken several months prior to the trial of the case, and there was ample time for correction of any inadvertent errors so that when the case was submitted to the Trial Court on that evidence, there was nothing else for the Court to do but to find accordingly, or reject the evidence as untrue, and it would make very little difference in the final outcome of this litigation whether this Court shall adopt the figures given by Mr. Lownes or cut out his deposition on the subject.

To sustain the Court's finding No. XV, there is nothing in the case except Taylor's testimony as to what Cheney told him would be the extra charges that would be exacted for performing the special services which Taylor required.

The Court's finding No. XVI as to the result of the failure of the defendant to perform its alleged contract to transport the 867 bales in a wet condition is flatly contradicted by the allegations of the complaint, which states that the natural and approximate result of the drying caused the delay complained of.

Finding No. XVII: The question involved in the exception to this finding is whether the insurer paid the loss covered by the policy of insurance. The defendant got the money as shown by the receipts given and admissions made in various ways through-

out the case in the pleadings, the evidence and the arguments. There are two reasons why we deny that that money was loaned: One is that the payment discharged the liability, and the other is that the plaintiff did not become subject to any liability as a borrower by being obligated to repay. The subterfuge of a loan is altogether predicated upon the phraseology in the receipts given, amounting to a promise to refund out of proceeds of the collection. By that arrangement, if the defendant in error fails to collect damages in this action, the insurer will not get a refund, and if the plaintiff in error shall be obligated to pay on account of the damages sued for, the defendant in error will not be benefited.

The iniquity of this case is clear; by a maritime disaster, merchandise in transit was damaged by being submerged in the hold of a stranded vessel. If the matter had ended there, there would have been only the liability of the insurer to recompense the owner of the goods. By the salvaging of the goods, the insurer became the gainer to the extent of the value of what was saved, and that is all.

But greed to profit from calamity inspired these New York financiers to instigate this lawsuit, and against that unholy conspiracy we invoke the power of this Appellate Court to reverse the judgment brought here for review.

Answering all of the arguments on the point as to the liability of railroad carriers for damages when they fail to perform contracts made in their behalf

by their station-agents and the authorities cited in the brief for the defendant in error, it is enough to say that contracts by agents within the scope of their apparent authority which are not tainted with illegality are binding upon their principles. For the failure to perform such contracts, liabilities for damages attach; that is a principle of law which we have not assailed. But this is a case where damages are claimed for breach of a carrier's contract by failure to perform an alleged contract which was never consummated between the carrier and the defendant in error acting through any agent having authority, or apparent authority, or pretending to have authority to make it, and which, if formally entered into by whomsoever may have assumed the authority, would be void because denounced by the laws enacted by Congress and the decisions of Courts of highest authority in this country.

In their brief, counsel for the defendant in error makes the vain attempt to avoid the decision of the Supreme Court of the United States in the case of Luckenbach vs. McCahan Sugar Refining Company, 248 U. S. 139, by quoting at length from the opinion of Mr. Justice Brandeis.

In some respects the Luckenbach case was like the pending case. It was a suit by a shipper against the carrier to recover damages for injury to a cargo in transit under a bill of lading contract containing a clause entitling the carrier to the benefit of insurance similar to the clause in the bill of lading con-

tracts in the pending case. The Supreme Court worked out a conclusion which in effect exonerated the insurer from any liability under the terms of its policy because the loss in that case was a result of unseaworthiness of the carrying vessel, and there being no insurance recoverable, the ship carrier was held liable for damages caused by its negligence.

All that is said in the opinion of the Court does not deny, nor counteract the plain declaration that such a clause in the carrier's contract is valid, and that if a shipper under a bill of lading containing that provision effects insurance and is paid the full amount of his loss, *neither he nor the insurer can recover against the carrier.*

Respectfully submitted,
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LIST OF ADDITIONAL AUTHORITIES.

On the point that Cheney had no authority to make a contract for transportation of merchandise by a passenger train:

Elkins vs. Boston Ry. Co., 23 N. H. 275; St. Louis, Iron Mountain & So. Ry. Co. vs. Knight, 122 U. S. 79.

On the point that where a complaint states a cause of action based on ownership, evidence of an equitable interest only will not support the action:

Stout vs. McPheeters, 84 Ind. 585; Hunt vs. Campbell, 83 Ind. 48; Groves vs. Mark, 32 Ind. 319; Rowe vs. Beckett, 30 Ind. 154.

Where the gist of the action is the fact that property *owned* or possessed by the plaintiff has been injured, an allegation of the plaintiff's *ownership* or possession is material and failure to prove such allegation constitutes a fatal variance:

Raymond vs. Parisho, 70 Ind. 256.

On the law as to importation of merchandise purchased on letters of credit and trust receipts given in exchange for bills of lading, the following cases are in point:

In re Coe, 169 Fed. Rep. 1002, opinion by Judge Holt.

A firm of importing merchants paid for a shipment of ostrich feathers by a draft on a bank pursuant to a credit arrangement; the feathers were consigned to the bank as owner and it paid the draft for purchase price, transferred the bill of lading to the importers and took in exchange therefor a "trust receipt"; the importers received the goods to be sold and accounted for and the proceeds to be applied in repayment of the money advanced by the bank.

In the opinion the Court said:

> "The bills of lading under which the goods were shipped consigned the goods to the Sovereign Bank of Canada. When they arrived in New York, and the drafts accompanying the bills had been paid, the Sovereign Bank of Canada had the legal title to the goods. When it authorized the delivery of the goods to the firm of Cadenas & Coe, it took trust receipts which, by express agreement, retained the title to the

goods and their proceeds in the Sovereign Bank of Canada."

Charavay & Bodvin vs. New York Silk Mfg. Co., 170 Fed. 919—Circuit Court, S. D. New York—Affirms a referee's Report.

Syllabus.

"A bank which advances money or credit for the purchase of goods for import, taking the bills of lading in its own name, becomes the legal owner of the goods, but its title is not an absolute but only a security title. If it permits the importer to take the goods on signing a trust, and subject to the order of the bank until its advances are paid, the transaction is not a conditional sale, but one for security only, and, where the bank reclaims the property and sells it as authorized by the trust receipts, the debt is not thereby canceled, but the bank may recover any deficiency remaining."

In re Cattus, 183 Fed. 733—C. C. A. Second Circuit.

In this case, Ward, Circuit Judge, said:

"In this case the bank had accepted drafts to the amount of some £5,000, had delivered the bills of lading for most of the goods to Cattus against his trust receipts before his adjudication as a bankrupt, and still has in its hands bills of lading for other goods not so delivered."

And further, after quoting the trust receipt:

"The structure of the instrument indicates that it has grown gradually, being altered to meet new exigencies, just as we find in many commercial documents like charter-parties, master's drafts, and riders on policies of fire and marine insurance in artistic and inconsistent provisions. This trust receipt contains clauses some of which describe the right of the banker in the goods as property or title and others as a lien. But the inconsistency is apparent rather than real, because, as Judge Hough

pointed out in the court below, it admits easily of division into two parts: First, an acknowledgment that the bankers are owners until payment of the acceptance for the purchase price of the specific goods and thereafter they are lienors for any other balance of indebtedness due from the bankrupts, however arising. Inasmuch as the proceeds of all the goods as well as all the goods in specie now in the hands of the trustee and of the banker are insufficient to pay the acceptance for the price of the specific goods covered by the bills of lading attached to the acceptances, we need not consider the clauses of the trust receipt relating to liens for general indebtedness or determine whether such pledge or lien would be good against the trustee.

"The purpose of the parties, describe the trust receipt as you will, was to keep the title to the goods in the bankers until their acceptances for the price of the goods were paid. The courts without always defining exactly what the relation between the parties is or always defining it in the same way, still are astute to protect the rights of the banker in such case. Moors vs. Kidder, 106 N. Y. 32, 12 N. E. 818; Drexel vs. Pease, 133 N. Y. 129, 30 N. E. 732; National Bank vs. Rogers, 166 N. Y. 380, 59 N. E. 922; Moors vs. Drury, 186 Mass. 424, 71 N. E. 810; New Haven Wire Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300."

In re Shulman, 206 Fed. 129.

This case makes a clear distinction between a trust receipt given by an *owner* whereby he agrees to hold the goods as security for a debt due to a bank, and a case where title is vested in the bank; by reference to the Century Throwing Co. case, 192 Fed. 252, it recognizes the authority of Judge

Gray's decision as applicable to a case where the bank by virtue of bills of lading takes title to the goods.

In re Dunlap Carpet Co., 206 Fed. 731:

In this case goods were purchased in a foreign country on credit extended to a bank and shipped consigned to the bank; on arrival the bills of lading were endorsed and delivered to the importer and it received possession of the goods giving a trust receipt by the terms of which title was retained in the bank, but the importer was authorized to sell the goods on credit and did so; without having paid the selling price the vendee became a bankrupt; the importer made a claim against the bankrupt's estate and received a dividend thereon and then assigned to claim for the balance thereof and its assignee received a second dividend; thereafter within the time for presenting claims against the estate, the bank made a claim for the same debt, which was contested by the importer's assignee. The Court held that the importer had not acquired title to the goods, therefore the bank was the true owner of the claim and not estopped by the previous presentation and assignment thereof, by the importer.

Vaughn v. Massachusetts Hide Corporation, 209 Fed. 667.

This case, in a general way, supports and adds weight to the authorities affirming the banker's title under a trust receipt, but is not of any particular value in our case; it is too complicated by special

agreements and conditions and rights of numerous parties.

Assets Realization Co. v. Sovereign Bank, 210 Fed. 156—Decision by C. C. A., Third Circuit. Opinion by Judge Gray.

This is an excellent authority in point.

Syllabus.

A bank having furnished money or credit with which wool was imported from Russia, taking bills of lading in its own name and usual trust receipts, continued to be the owner when the wool was sold by the importer until title passed to the purchaser, who thereafter became a bankrupt, and then was the owner of the account for the purchase price. *Held,* that the bank alone was entitled to prove the claim for the price against the estate of the bankrupt purchaser, of which right it was not deprived by the fact that a claim was filed by the importer, and after payment of a dividend thereon was assigned to another whose claim would be expunged.

In re Killian Mfg. Co., 209 Fed. 498; affirmed by the C. C. A., Third Circuit, in Roth v. Smith, 215 Fed. 82.

These cases follow The Throwing Co. case, 197 Fed. 252, and hold that where the importer became bankrupt, the banker's title under a trust receipt is superior to that of the trustee of the bankrupt estate.

In re Richheimer, 221 Fed. 16—Decision by C. C. A. Seventh Circuit.

This is an adverse decision; the Court held that the effect and validity of the banker's title was

governed, not by the general commercial law, apart from the local law, but by the local law, as the ownership and transfer of and liens upon personal property which has come within a state are subject to and controlled by the policy adopted by such state.

In re Marks & Co., 222 Fed. 52—Decision by C. C. A., Second Circuit.

This was a bankruptcy case in which trust receipt transactions gave rise to the questions litigated. The trustee of the bankrupt estate contended that the documents and conduct of the parties constituted a chattel mortgage upon the goods, which was void as to creditors because not filed as required by the Lien Law of New York, and that "the whole thing was a sham. Answering this contention the Court said:

> "We do not concur in this view at all. The plain intention of the parties was that title to the goods should remain in the bankers until they were reimbursed for paying the price of them to the seller. * * * The subject has been so fully considered both in this Circuit and in the Third Circuit, that we shall do no more than refer to the decisions. Charavay & Bodvin Co. vs. York Silk Co. (C.C.), 170 Fed. 819; In re Cattus, 183 Fed. 733, 106 C. C. A. 171; Century Throwing Co. vs. Muller, 197 Fed. 252 (116 C. C. A. 614); In re Killian Mfg. Co. (D. C.), 209 Fed. 498; Assets Realization Co. vs. Bank, 210 Fed. 156, 126 C. C. A. 662."

In re Bettman-Johnson Co., 250 Fed. 657—Decision by C. C. A., Sixth Circuit.

This is another adverse decision.

Syllabus.

"Contracts of conditional sales are good as between the parties, though not recorded; but, unless Gen. Code Ohio, sec. 8568, is complied with, the rights of the seller are inferior to those of creditors, who have fastened upon the property by some specific lien.

"The appointment of a receiver, who took charge of the property of an Ohio manufacturer, including that which had been delivered under a trust receipt, which was neither verified nor filed as required by Gen. Code Ohio, sec. 8568, fastens the claims of creditors upon it as effectually as though the creditors had seized the same under attachment or levy of execution."

If these apparently adverse decisions shall be cited against us, we can rely that in this case we are not confronted with any rights of creditors, *bona fide* purchasers or conflicting local statutes; and they are, in effect, overruled by the Supreme Court in the following case:

Com. Nat. Bank vs. Canal-Louisiana B. & T. Co., 239 U. S. 520, 60 L. Ed. 417.

In this case the controversy was between two banks, each claiming ownership of cotton in the custody of the trustee of a bankrupt's estate. The bankrupt had pledged the cotton as security for advances of money to the Canal-Louisiana Bank, by delivery of bills of lading representing the cotton, and had obtained possession of the bills of lading, giving in exchange a trust receipt, and having those documents, obtained possession of the cotton and stored it, taking negotiable warehouse receipts

therefor; the warehouse receipts were then pledged to the Commercial National Bank as security for additional money; the bankrupts next obtained possession of the warehouse receipts, giving in exchange a trust receipt. So that the two contending banks were pledgees of the same property, each having a trust receipt as its muniment of title; and to determine which should prevail over the other was the task undertaken by the Courts. If the principle controlling the decisions in the Richheimer and Bettman-Johnson Co. cases had been applied, the cotton might have been awarded to the trustee in bankruptcy, who had possession of part of it. The District Court, however, gave its decision in favor of the elder pledgee-holder of the trust receipt taken in exchange for the bills of lading (205 Fed. 568); and that decision was affirmed by the C. C. A. (211 Fed. 337). The Supreme Court reversed the lower courts and gave the cotton to the latest victim of the bankrupt's fraudulent practices. The importance of this case is in the fact that the Supreme Court sanctioned the rulings in the case hereinbefore cited. In the opinion Mr. Justice Hughes said:

> "We assume that under the jurisprudence of Louisiana the transaction between Dreul & Company and the Canal-Louisiana Bank (described by the bank as a pledge), created rights in the bank in the nature of ownership for the purpose of securing its advances (Rev. Stats. (La.) 2482; Civil Code, arts. 3157, 3158, 3170, 3173; Fidelity & D. Co. vs. Johnston, 117 La. 880, 889, 42 So. 357; Act 94 of 1912 (Uniform Bills

of Lading Act), #32): and that when the Canal-Louisiana Bank intrusted the bills of lading to Dreuil & Company for the purposes described in the trust receipts, given to that bank, it could still assert its title as against Dreuil & Company and their trustees in bankruptcy. See Clark vs. Iselin, 21 Wall. 360, 368, 22 L. Ed. 568, 571; Re E. Reboulin Fils & Co., 165 Fed. 245; Charavay vs. York Silk Mfg. Co., 170 Fed. 819; Re Cattus, 106 C. C. A. 171, 183 Fed. 733; Century Throwing Co. vs. Muller, 116 C. C. A. 614, 197 Fed. 252; Re Dunlap Carpet Co., 206 Fed. 726; Assets Realization Co. vs. Sovereign Bank, 126 C. C. A. 662, 210 Fed. 156; Moors vs. Kidder, 106 N. Y. 32, 12 N. E. 818; Drexel vs. Pease, 133 N. Y. 129, 30 N. E. 732; Moors vs. Wyman, 146 Mass. 60, 15 N. E. 104; Moors vs. Drury, 186 Mass. 424, 71 N. E. 810; Hamilton vs. Billington, 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904; Williston, Sales, #437. No question is presented as to the effect, in the light of the Uniform Bills of Lading Act passed in Louisiana in 1912 (Act 94), of an attempted negotiation by Dreuil & Company of the bills of lading contrary to the terms of the trust receipts. See Roland M. Baker Co. vs. Brown, 214 Mass. 196, 203, 100 N. E. 1025. The bills of lading were not negotiated; they served their purpose, being surrendered to the railroad company on the delivery of the goods to Dreuil & Company. The transactions with the 'pickery' are not material to the question to be decided. Dreuil & Company having obtained possession of the cotton, as we contemplated, placed it in store, and the question is as to the effect of the negotiation of the warehouse receipts to the Commercial Bank."